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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS CABRERA, Defendant and Appellant.	B262303 (Los Angeles County Super. Ct. No. KA098031)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed as modified.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Luis Cabrera appeals from a judgment entered following a jury trial in which he was convicted of second degree robbery, contending: Insufficient evidence supported the findings that he harbored intent to commit the robbery and instilled fear in the victim; the trial court erroneously admitted a statement Cabrera made in another case; imposition of a weapon enhancement was improper; and the court abused its discretion in denying Cabrera's *Romero*[1] motion. We disagree as to the weapon enhancement, but otherwise affirm.

BACKGROUND

Defendant has a long, unbroken criminal history. He suffered approximately five sustained petitions as a juvenile, some of which were felonies, and five misdemeanor convictions as an adult followed by two felonies. In 2008, he was convicted of issuing a criminal threat and sentenced to seven years in prison.

In the early morning of May 22, 2012, defendant, recently released from prison after serving a long sentence, rode a bicycle in South El Monte while carrying a can of beer in a bag. He approached Andrew Vasquez, who was walking home, stopped six or seven feet away, and, with his hands in his hoodie pockets, told Vasquez, "give me your phone or I'm going to shoot you." Vasquez refused, whereupon defendant repeated the demand. After Vasquez again refused, defendant repeated the demand a third time. When Vasquez continued to refuse, defendant said, "just give me your money." Vasquez handed over four dollars, and defendant left, saying "This is my streets." Vasquez testified he smelled beer on defendant.

Vasquez turned to go the other way and immediately saw a passing police cruiser, which he flagged down. After telling the officer what had happened, Vasquez continued his journey home, but was soon intercepted by police, who took him to where defendant had been detained for identification.

At trial, Vasquez testified he was afraid defendant would shoot him but nevertheless refused to relinquish his cell phone. He never saw any weapon, although

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[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

police found a screwdriver in some bushes in which defendant had tried to hide before being arrested.

Clinical psychologist Ann Walker reviewed defendant's school and medical records, noting he was at a second grade academic level when he dropped out of school in the ninth grade. Dr. Walker testified defendant had a Wechsler IQ of 66 and suffered significant mental disablement, and she opined his cognitive functioning was that of a six- or seven-year old. He had little ability to reason, and although he might know whether a behavior was wrong or against the rules, he would be unable to comprehend why it was wrong or what consequences would flow from improper behavior. Dr. Walker testified defendant told her he had been drinking before the robbery and had no memory of it. She opined alcohol consumption would cause his already limited cognitive abilities to become significantly diminished.

In rebuttal, the People played to the jury a recording of a 2008 custodial police interview, during which defendant answered in a reasonably lucid manner questions about where he used to work, what he had been doing that day, where he lived, and where an aunt lived.

The jury convicted defendant of robbery (Pen. Code, § 211)[2] and found true the special allegation that he possessed a screwdriver in committing the crime. After extended mental competency proceedings, defendant admitted he had suffered one prior conviction for making criminal threats (§ 422), a serious felony constituting a "strike" within the meaning of the "Three Strikes" laws (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)), but moved to have the strike allegation dismissed for purposes of sentencing on the ground that the prior conviction, was "directly related to his mental retardation." The trial court denied the motion and sentenced him to 12 years in prison.

Defendant timely appealed.

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[2] Undesignated statutory references will be to the Penal Code.

DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his robbery conviction because no evidence indicated he had the mental capacity to form the specific intent to commit robbery, and no evidence indicated the victim was induced by fear to hand over $4. We conclude the evidence sufficed.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "Where the element of force or fear is absent, a taking from the person is only theft . . . ." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) Robbery is a specific intent offense that requires the prosecution to prove the defendant intended to permanently deprive the victim of the property taken. (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Because there is rarely direct evidence of specific intent, it must usually be shown from the circumstances of the crime. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 849.) "The federal

standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The "direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) The reliability of properly admitted eyewitness evidence, "like the credibility of the other parts of the prosecution's case is a matter for the jury." (*Foster v. California* (1969) 394 U.S. 440, 443, fn. 2; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 ["We do not reweigh evidence or reevaluate a witness's credibility"].)

Defendant argues his diminished mental capacity rendered him unable to distinguish right from wrong, which negated the formation of specific intent required for robbery and constituted an absolute defense. (§ 26; *People v. Skinner* (1985) 39 Cal.3d 765, 783 [a defendant who cannot understand right from wrong "is not criminally liable merely because he knows the act is unlawful"].) The argument is without merit.

"The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (§ 29; *People v. Mills* (2012) 55 Cal.4th 663, 672; *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112.) Here, defendant threatened Vasquez, took his money, and rode away, saying "This is my streets." These facts on their face support the jury's conclusion that defendant intended permanently to deprive Vasquez of the money. To the extent defendant now argues he was *incapable* of forming the necessary intent, the argument is inapposite because the defense of diminished capacity no longer exists in California. (§ 25, subd. (a) ["The defense of diminished capacity is hereby abolished"].) A defendant wishing to establish that he or she was incapable of distinguishing right from wrong at the time of the commission of the offense must enter a plea of guilty by reason of insanity. (§ 25, subd. (b).) Defendant entered no such plea. Therefore, Dr. Walker's testimony was admissible only to show whether

defendant *actually* formed the required specific intent to commit robbery, not to show whether he was capable of forming that intent. (§ 28, subd. (a) [evidence of a mental defect "shall not be admitted to show or negate the capacity to form any mental state," but is "admissible solely on the issue of whether or not the accused actually formed a required specific intent"]; § 29 [an expert testifying in the guilt phase of a criminal action "shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to . . . intent . . . for the crimes charged"].) On that issue, Dr. Walker's testimony was contradicted both by the facts of the crime and by the 2008 custodial police interview, during which defendant was able to answer questions about where he used to work, his activities that day, and where he and a relative lived. The jury could reasonably conclude from the circumstances of the crime and defendant's lucidity during the interview that he formed the specific intent permanently to deprive Vasquez of his money.

Defendant also argues no evidence suggests Vasquez was actually afraid during the robbery. The argument is without merit.

Vasquez testified defendant kept his hands in his hoodie pockets when demanding his phone and money and said he would shoot if they were not relinquished. Vasquez testified he was afraid defendant was going to shoot him. The jury could reasonably conclude from this testimony that defendant acquired Vasquez's $4 by use of force or fear.

In contending the finding was unsupported, defendant points out several deficiencies in the evidence and posits countervailing theories: Defendant did not act aggressively or raise his voice; Vasquez's behavior was inconsistent with that of someone who was fearful, as he refused to relinquish his phone and declined to call the police immediately or await their return after they went looking for defendant. Defendant argues this demonstrates lack of force or fear. We disagree. Evidence supporting a conviction is not rendered insufficient by other evidence that supports acquittal. Defendant had an opportunity to cross-examine witnesses and to argue to the jury that the defense evidence made a finding of force or fear inappropriate. It was then the jury's

responsibility to weigh the evidence and determine whether it sufficed. Viewing the record as a whole, considering the totality of the circumstances, and presuming the existence of every fact the trier of fact could reasonably deduce from the evidence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we conclude that the evidence supporting defendant's conviction was reasonable, credible, and of solid value.

B. Admission of the 2008 Police Interview

The prosecution offered the recording of the 2008 custodial police interview to rebut Dr. Walker's opinion that defendant suffered from severely diminished mental capacity. The original interview was approximately 11 minutes long and contained references to defendant's claim to gang membership and his admissions regarding prior incarcerations and to having made criminal threats. After defendant's counsel objected to these portions of the interview, the interview was sanitized so as to include only questions about where defendant worked, what he had been doing on the day of the interview, where he lived, and where an aunt lived. Defendant offered no objection to playing the redacted interview to the jury, the transcript of which occupies two pages.

Defendant now argues the interview contained hearsay and was unduly prejudicial because it revealed to the jury that defendant had been the subject of prior criminal proceedings. We disagree.

Preliminarily, we agree with respondent's argument that defendant forfeited the argument by failing to object to admission of the redacted interview. (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Defendant's argument fails on the merits as well.

Hearsay is evidence of an out of court statement offered to prove the truth of the matter asserted in the statement. (Evid. Code, § 1200, subd. (a).) Here, the interview evidence was offered to prove defendant was capable of simple reasoning, not to prove the truth of any matter stated in the interview. It was therefore not hearsay.

Under Evidence Code section 352, the trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The "trial court

enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] . . . [I]ts exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the trial court admitted evidence that defendant had offered responsive answers in a prior police interview in a custodial setting. The evidence was relevant to the prosecution's claim that defendant formed the specific intent to deprive Vasquez of his property, and to rebut Dr. Walker's opinion that he could not have formed that intent. The interview was therefore admissible.

In weighing the probative value of evidence against the danger of undue prejudice or confusion of the issues, the trial court found the evidence had substantial probative value because it was relevant to prove intent, and references to the prior offense, prior incarcerations, and defendant's claim of gang membership had been excised. Thus no information was revealed about the nature of the events leading up to the interview or about any resolution of that criminal matter. There was no suggestion the prior criminal proceedings were any more inflammatory or egregious than the current charge. Although evidence of prior criminal proceedings carried a risk of juror confusion and unfair prejudice, the trial court properly found the probative value of appellant's uncharged offense in establishing intent and plan outweighed its unduly prejudicial effect. Accordingly, the trial court committed no error in admitting the evidence.

C. The Trial Court's Discretion to Dismiss a Prior Strike

Defendant contends the trial court abused its discretion when it sentenced him as a second strike offender under the Three Strikes law instead of exercising its discretion to dismiss his prior strike conviction in furtherance of justice under section 1385.

In cases arising under the Three Strikes law, a trial court has limited "discretion to strike prior felony conviction allegations in furtherance of justice pursuant to section 1385[, subdivision] (a)." (*Romero*, *supra*, 13 Cal.4th at pp. 504, 530, fn. 13.) When

deciding whether to dismiss a prior conviction allegation under section 1385, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The "three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In reviewing the trial court's decision for abuse of discretion, we determine whether it "'falls outside the bounds of reason'" under the law and the facts of the case. (*People v. Williams*, *supra*, at p. 162.) A defendant who "seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Defendant is well familiar with the criminal justice system. He had approximately five sustained petitions as a juvenile, some of which were felonies. He suffered five misdemeanor convictions as an adult, followed by two felonies, and in 2008 was convicted of issuing a criminal threat and sentenced to seven years in prison. He had been out of prison only a few weeks when he deliberately sought out and brazenly accosted Vasquez, demanded his phone and money, and threatened to shoot him. The trial court considered the nature and circumstances of the present felony, its consonance with defendant's immediately prior felony of issuing a criminal threat, and the particulars of his background, mental capability and prospects.

Defendant argued below and reiterates on appeal that his mental incapacity renders him outside the spirit of the Three Strikes scheme. But his mental capacity was disputed. Defendant presented the opinion of Dr. Gabrielle DuVergales, who concluded he was not competent. In rebuttal, Dr. Gordon Plotkin opined defendant was feigning

some of his difficulty. Dr. Edward Fischer concurred, as did the trial court, which found defendant had "intellectual challenges," but "has been and continues to be a malingerer in an attempt to exaggerate whatever intellectual limitations he actually has."

Nothing suggests defendant falls outside the spirit of the Three Strikes scheme. Therefore, the trial court did not abuse its discretion in sentencing him as a second strike offender.

D. The Sentence Must be Modified

Defendant argues the judgment must be modified to strike a one-year sentence enhancement imposed because the jury found he was personally armed with a deadly weapon during the robbery. Respondent concedes the point, and we agree. The first amended information alleged defendant personally used a deadly weapon—a screwdriver. Before closing arguments, the trial court granted defendant's motion to dismiss the allegation on the ground of insufficient evidence, but also granted the People's motion to amend the information to allege defendant personally *possessed* a deadly weapon within the meaning of section 12022.3, which the jury ultimately found true. However, section 12022.3 authorizes an additional term of imprisonment only for a defendant who possesses a deadly weapon during an enumerated sex offense, not robbery. The enhancement must therefore be stricken.

DISPOSITION

The judgment is modified to strike the weapon enhancement under section 12022.3. In all other respects the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified and forward a copy of it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. LUI, J.